

(Illicit) transfer by De Gree¹

Julia Sloth-Nielsen

Professor of Law, University of the Western Cape

Benyam D. Mezmur

Doctoral Intern, Community Law Centre, University of the Western Cape

1 INTRODUCTION

The decision of the Supreme Court of Appeal (SCA) in *De Gree v Webb* [2007] SCA 87 (RSA)² is worthy of consideration for a number of reasons, reasons which do not include the prominent (emotive) media attention devoted to the facts both before the appeal, and the ongoing publicity which occurred in diverse press and radio reports after judgment was handed down. This matter is reportedly further being considered for an appeal to the Constitutional Court. This, too, indicates both the public concern with, and vested interests in, the outcome of what was widely agreed, ultimately, to be an international adoption.³

An obvious reason why the case warrants airing lies in the strongly worded judgments – four in all – penned in the SCA. They raise what are clearly issues close to the heart of the individual judges who were called upon to adjudicate this specific dispute, and moreover, flag divergent policy choices underlying the judicial approaches to child protection insofar as inter-country adoption is concerned. The case, therefore, provides the opportunity to examine the fundamental principles applicable to the international transfer of children via the adoption process, and to dissect the role of the court in giving effect to the treaty obligations engendered by South Africa's ratification of the Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption (1993) (hereafter Hague Convention). The suitability of a guardianship application in the High Court to effect the first step of an international adoption is considered against the backdrop of the requirements of international law.

1 It is hereby acknowledged that this work is based upon research supported by the National Research Foundation.

2 Available at < http://www.law.wits.ac.za/sca/judgment.php?case_id=13538>

3 The vested interests in adoption was highlighted as forming the basis for much 'children's rights' litigation in a review of jurisprudence between 1996 and 2001 surrounding section 28 of the constitution. See Sloth-Nielsen J 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the rights of the child' (2002) 10 (2) International Journal of Children's Rights 137.

The bald facts of the case were precipitated by the launch in the Johannesburg High Court of an application for an order granting the American applicants guardianship over a minor baby girl of South African birth, who had been abandoned and was in foster care. The 'respondents' were opponents in name only: they were the child's existing foster parents, and they did not oppose the proposed order. They had become friends of the prospective adoptive parents, who had formed a relationship with the child while visiting her in their care. Further, it was common cause that, once armed with a guardianship order (without which they would have had great difficulty proceeding beyond the borders of the RSA with an unrelated infant), the applicants were intending to depart the country, and to pursue an adoption order in the relevant domestic forum in the USA.

The initial judge⁴ became concerned about the lack of effective opposition in the case, and invited the intervention of an *amicus*, the Centre for Child Law, a public interest litigation unit based at the University of Pretoria. The arguments of the *amicus* won the day in the High Court and, subsequently in the SCA, the appellants were also unsuccessful in their pursuit of an order granting them guardianship of the child. The majority judgment, penned by Theron AJA (in which Snyders AJA concurred) was supplemented by a judgment of Ponnan JA, while minority judgements were handed down by Heher JA and Hancke AJA respectively, the former rather more substantive in its consideration of the issues at hand.

It must be noted that the majority, including Judge Ponnan, found that the suitability of the applicants as prospective adoptive parents was not in dispute. However, the application for an order declaring them to be the guardians of the child constituted the incorrect procedure: the appropriate avenue would have been to seek an adoption order in the Children's Court, as envisaged by the Constitutional Court in the case of *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), and the relevant chapters of the Child Care Act 74 of 1983. In *Fitzpatrick*, it will be recalled, the Constitutional Court struck down those provisions of the Child Care Act 74 of 1983 that permitted an adoption to be effected only by South African citizens, thereby opening the door to inter-country adoptions taking place in respect of South African children for the first time.

Subsequently, South Africa ratified the Hague Convention in 2003, and it was common cause in *De Gree* that the treaty awaits domestication via the Children's Act 38 of 2005, which is only partially in operation (as of 1 July 2007), as the process of completion of the Act and the regulations thereto are still ongoing. The envisaged legislation will not only incorporate the Hague Convention principles and procedures in South African law, but will also add several new features to our law relating to domestic adoption, including provisions establishing a register of adoptable children and prospective adoptive parents (RACAP),⁵ freeing orders,⁶ and new provisions to cater in law for

4 In *De Gree and Another v Webb and Others* 2006 (6) SA 33 (WLD)

5 S 232 of the Children's Act 38 of 2005

6 S 235 of the Children's Act 38 of 2005

so-called open adoptions,⁷ in which some degree of contact is maintained between the birth parent(s) and the adoptive parents after the adoption has been effected.

Provisionally, the establishment of an interim Central Authority,⁸ as required by the Hague Convention, the drafting and concluding of working agreements with adoption agencies and Central Authorities abroad, and the conclusion of more than 1 000 inter-country adoptions with the co-operation of the interim Central Authority (the National Department of Social Development) have taken place over the period 2003 until now, as is comprehensively spelt out in the *amicus* brief, which is cited in considerable detail in the judgment.⁹

However, the majority in the SCA held that the principal reason for their stance that the guardianship application could not be granted was the evident conflict between international law (including not only the Hague Convention, but also relevant provisions of the Convention on the Rights of the Child (CRC)¹⁰ and the African Charter on the Rights and Welfare of the Child (ACRWC)¹¹ related to inter-country adoption) and the route of pursuing a guardianship order chosen by the applicants, as well as the best interests of the child principle, which dictated that it was not in the child's best interest to 'be removed from the country without ... the protection and safeguards of an adoption first effected in the Children's Court'.¹²

In contrast to this, after referring to article 4 of the Hague Convention which deals with the 'adoptability' criteria of the child and his or her 'eligibility', as well as the 'suitability' of the prospective adoptive parents, Heher JA concluded that:

Every principle of the Hague Convention which is relevant to this application (and its spirit) has been satisfied by the evidence presented to the court *a quo* insofar as that was practicable.¹³

Although the case raises many other issues of interest (such as the role of an *amicus*, the desirability or appropriateness of taking into account government policy as articulated in adopted, but unpromulgated, legislation, or the proper role of the High Court as upper guardian of all minors within its area of jurisdiction), the major issue that we address in this note relates to the fundamental principles underpinning the Hague Convention. We argue that the minority judgments misconceive the nature of the Hague principles and their underlying rationale to a significant extent, and further, that even the majority judgments do not fully explain the reasons for which the alleged conflict with

7 S 234 of the Children's Act 38 of 2005

8 A central authority must be identified by a ratifying State Party in its depositary instrument

9 See, for instance, paras 7 and 19 of the majority judgment, para 51 of the judgment of Heher JA, and paras 89–93 of the judgment of Ponnar JA.

10 Ratified on 16 June 1995.

11 Ratified on 7 January 2000.

12 Para 27 of the judgment of Theron AJA

13 Para 48 of the judgment. See, too, the minority judgment of Hancke AJA to the effect that 'the applicants produced evidence sufficient to satisfy the law of adoption in South Africa and the Hague Convention on Inter-country Adoption, and there is no advantage to the child in having them rehash the evidence in the children's court' (para 101).

the international law provisions render the use of a guardianship procedures to effect an inter-country adoption fatally flawed. We also contend that the fulfilment of the principle of subsidiarity,¹⁴ while remaining at the heart of the international law framework established in article 21 of the CRC and article 24 (b) of the ACRWC, was overemphasised in the minority judgments, at the expense of other overarching principles relevant to inter-country adoption. However, we do not traverse the subsidiarity principle in very much detail, given that it receives adequate elaboration in the texts of the judgments.

In our conclusion, we argue that conferring parental status on a prospective adoptive parent via a guardianship order violates fundamental constitutional principles and policy considerations, and that sanctioning this avenue – even temporarily until the full promulgation of the Children's Act 38 of 2005 renders this unlawful – is unnecessary and unwarranted.

2 THE SOUTH AFRICAN COURTS AND INTERNATIONAL LAW

In order to put the discussion in context, it is apposite to highlight the status of international law in the South African legal system. Fortunately, the South African receptiveness to international legal ideas was constitutionalised. Section 39 of the Constitution – commonly known as the interpretation clause – requires that 'when interpreting the Bill of Rights... a court *must* consider international law'.¹⁵ As early as in *S v Makwanyane* in 1996, the Constitutional Court indicated its stance towards international law in domestic jurisprudence, saying that 'international agreements and customary law provide a framework within which ... the Bill of Rights can be evaluated and understood ...'¹⁶ and '... may provide guidance as to the correct interpretation of particular provisions'.¹⁷ It has been argued, rightly, that the reference to

14 Which entails that inter-country adoption may only be considered if domestic placement is not an option.

15 S 39(1)(a) of the Constitution. The Constitution gives more value to international law than comparative case law as the Constitution states that a court 'may consider foreign law'. See generally Currie I and De Waal J *The Bill of Rights handbook* (2005) (5th ed.) 159–162. See also generally Du Plessis M 'The application and influence of U.N. human rights standards in practice: The South African Experience' (2002) 4 *European Human Rights Law Review* 452–457. Hovell & Williams indicate that 33 per cent of cases dealing with the Bill of Rights (1995–2004) have used international law as opposed to only 6 per cent of cases dealing with non-Bill of Rights issues (1995–2004) by the Constitutional Court. This is indicative of the fact that the courts should and indeed do give more weight to international law while interpreting the Bill of Rights of the Constitution as opposed to other sections. See Hovell D & Williams G 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 116.

16 *S v Makwanyane* 1995 (3) SA 391 (CC) paras 36–7

17 *Ibid.* It is interesting to note that the interpretation that the Constitutional Court gives to 'international law' in this context is not only limited to decisions of comparable interpretative bodies such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights, but could also cover a broader array of 'jurisprudence' of specialised agencies. 'Specialised agency' in regard to the case at hand could relate to bodies, such as UNICEF and the Hague Conference on Private International Law which is a global inter-governmental organisation charged with custody of the Hague Convention. Although this body does not issue 'soft' international legal instruments, such as General Comments, or agree Rules for specific situations (as does the UN, e.g. in respect of children deprived of their liberty), its practice notes, manuals and guidelines constitute the agreed operational guidelines amongst member nations, and may therefore indeed also constitute a form of 'soft' 'international law' to which our courts may have regard.

international human rights law in general for purposes of interpretation is not limited to instruments that are binding on South Africa (though these have more persuasive force)¹⁸ but also to other international conventions and to international custom.¹⁹ In addition, not only is customary international law considered law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament,²⁰ but the Constitution expressly states that in interpreting legislation, an interpretation consistent with international law is to be preferred.²¹ This gives the Court 'considerable scope in reducing a possible conflict between legislation and international law, whether it is customary international law or treaty law.'²² In the case at hand, however, the concern is not with legislative interpretation, but rather with the interpretation of the Bill of Rights (insofar as the best interests of the child in section 28(2), the child's right to family or alternative care in section 28(1)(b), the child's right to protection from abuse, neglect, maltreatment and degradation in section 28(1)(d), amongst others, are concerned), and the interpretation of the common law is raised insofar as the role of the institution of the High Court as upper guardian of all minors has to be traversed.

Therefore, we suggest that South African courts, tribunals and forums have the constitutional obligation to accord, for instance, the Hague Convention and its principles (if not also its practices, procedures and guidelines), the appropriate weight it calls for as outlined under the provisions of the Constitution mentioned above.²³ This is the case not only because it is an instrument that has been 'ratified' by South Africa, but would be necessary even as a signed instrument.²⁴ The phrase '*must* consider international law' under section 39(1)(b) imposes an obligation onto the courts to refer to and utilise the legal principles under the Hague Convention when performing their interpretive task. According appropriate weight to the Hague Convention entails that, as binding international law, it should carry even greater persuasive force 'since the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of (such) international law.'²⁵ A South African court cannot

18 See *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26.

19 Dugard J 'The role of international law in interpreting the Bill of Rights' (1994) 101 *South African Journal of Human Rights Law* 208

20 S 232 of the Constitution

21 S 233 of the Constitution

22 De Wet E "'Friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court' (2005) 28 *Fordham International Law* 1533

23 Note that in the sphere of inter-country adoption, it is not only the Hague Convention which contains relevant international law principles. South Africa has also ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child pornography (2000), which provides, *inter alia*, that 'State parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments (article 3(5))'. The Hague Adoption Convention is referred to directly in the Preamble to the Optional Protocol.

24 For further details, see conclusion section below arguing about the value to be accorded to an international treaty signed but not ratified by a country (South Africa) and its status under customary international law.

25 *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26

simply disregard or give 'lip service' to the Hague Convention but should refer to, analyse and assess the principles of the Hague Convention when dealing with cases resembling or directly related to inter-country adoption. Moreover, its principles should be used to inform the development of the common law to interpret the involvement of High Courts with regards to prospective inter-country adopters acting in contravention of the international law to which South Africa is bound.

Supplementary to this, the principles of the CRC and ACRWC, as they are both instruments ratified by South Africa, are of great significance in understanding the obligations created by section 28 of the Constitution. In *Grootboom*, the applicability of the International Covenant on Economic, Social and Cultural Rights in South Africa was raised. Although the Court highlighted that '[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary',²⁶ it was held that 'where the relevant principle of international law binds South Africa, it may be directly applicable'.²⁷ Therefore, in the case at hand, for instance, a combined reading of sections 39 and 232 of the Constitution makes it incumbent on South African courts to take stock of and apply Article 24(f) of the ACRWC. Article 24(f) of the ACRWC requires follow-up once adoption takes place by stating that State Parties shall 'establish a machinery to monitor the well-being of the adopted child'. We suggest that this be a further factor to be taken into account when dealing with cases resembling or directly related to inter-country adoption.

3 FUNDAMENTAL PRINCIPLES OF THE HAGUE CONVENTION

In the words of the Permanent Bureau of the Hague Conference, which is the custodian of the Hague Convention:

26 *Government of the Republic of South Africa v Grootboom* (2001) (1) SA 46 (CC) para 26

27 *Ibid.* It also needs to be noted a guardianship order may have further implications related to South Africa's obligation as a signatory to the Hague Convention. In international law, Article 18 of the Vienna Convention on the Law of Treaties (1969) imposes an obligation on signatory states that they refrain from defeating the object and purpose of a treaty. It is argued correctly by Charme that 'both conventional law and case law address the pre-ratification obligations of signatory states. Together they establish the propriety of portraying the interim obligation to refrain from defeating the object and purpose of a treaty as customary law.' See Charme JS 'The interim obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making sense of an enigma' (1992) 25 *George Washington Journal of International Law and Economics* 77–78. For further sources that deem (at least) certain provisions of the Vienna Convention on the Law of Treaties as reflective of customary international law, thereby binding upon all states, see Briggs HW 'United States Ratification of the Vienna Treaty Convention' (1979) 73 *American Journal of International Law* 470; Advisory Opinion of the International Court of Justice, 'Legal Consequences for States of the Continued Presence of South Africa in Namibia' (21 June 1971) 1971 *I.C.J.* 16, 46–47; see also 'Fisheries jurisdiction (*U.K. and Ir. v. Ice.*)', (2 February 1973) 1973 *I.C.J.* 3, 14, 18; see further 'Appeal relating to the jurisdiction of the ICAO Council (*India v. Pak.*)', (18 August 1972) 1972 *I.C.J.* 46, 67. Accordingly, even if South Africa's status as a State Party which has ratified the Hague Convention is dismissed because of the absence of domesticating municipal law to date, nevertheless as a signatory, South Africa has the obligation not to undertake any action that derails the spirit and purpose of the Hague Convention. Permitting High Courts to effect inter-country adoptions by conferring guardianship upon future adoptive parents, it is argued, can be considered to defeat, if not all, at least some of the purposes of the Hague Convention.

'The (Hague Adoption Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This Convention, ... reinforces the UN Convention on the Rights of the Child (Art. 21) and seeks to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.'²⁸

The Hague Convention seeks to cover all inter-country adoptions between countries becoming parties to it, whether those adoptions are partly prospective parent initiated or are arranged by public authorities, by adoption agencies or by private providers of adoption services. It sets out a framework of internationally agreed minimum norms and procedures that are to be complied with to protect not just the children involved, but also the interests of both their birth parents and their adoptive parents. Contracting States are free to maintain or impose requirements and prohibitions additional to those set out in the Convention.

Discerning the main purposes of the Hague Convention is not a difficult task. In no particular order of priority, article 1 succinctly states the key objectives as follows under the title 'Scope of the Convention':

'The objects of the present Convention are:

- (a) to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect to his or her fundamental rights as are recognised in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.'

It is instructive to note that, while both majority and minority judgments in *De Gree* refer to and discuss other articles of the Hague Convention (such as articles 4 and 5) in the text of the judgment, and to some of the elements set out in article 1 (such as the reference to article 1 in footnote 7 under para 11 and the judgment of Ponnán JA at para 86, where, in addition to the sale of children, he details a list of abuses that have previously been associated with inter-country adoption processes), article 1 is not subjected to any sustained analysis in the case. We contend that, seen together with the substantive articles contained throughout the Convention, article 1 lays an essential basis for the examining the principal rationale justifying the Convention's scheme and procedures, and hence enables us to compare the legitimacy of a guardianship application in the High Court as a precursor to an inter-country adoption in its proper context. Hence, article 1 is used as the basis for the analysis that follows in the succeeding subsections.

28 Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=text.display&tid=45> (accessed 24 July 2007)

3.1 The principle that inter-country adoption is a rightful concern of public authorities

The very fact that there is in existence a private international law treaty able to be ratified by member states of the Hague Conference on Private International Law to regulate inter-country adoption does not necessarily explain the crucial point that inter-country adoption is not purely a matter for private legal regulation. Some of the Hague treaties deal with private law matters at an inter-country level (for instance, the enforcement of private maintenance orders obtained in a foreign jurisdiction) without disturbing the basic notion that the issue at hand still falls within the private sphere of interests of the respective parties. This is not the case with inter-country adoption.

In relation to the Hague Convention, it has been clearly articulated that

'[o]ne of its basic premises is that adoption is not an individual affair, which can be left exclusively to the child's birth parents or legal guardians, or to the protective adoption parents or other intermediaries, but rather a social and legal measure for the protection of children. Consequently, procedures for inter-country adoption should ultimately be the responsibility of the States involved, which must guarantee that the adoption corresponds to the child best interests and respects his or her fundamental rights.'²⁹

Hence, provisions for the designation of a Central Authority,³⁰ for the accreditation of inter-country adoption service providers by such Central Authority,³¹ and for notification at the time of deposit of the instrument of ratification of the Convention of 'the identity and functions of the authority or authorities which, in that state, are competent to make the certification [of an adoption that has been effected] ...' 'It shall also notify the depositary of any modification in the designation of these authorities',³² are all supportive of an extensive regulatory interest in, and oversight of, the process of inter-country adoptions as a matter of concern for the executive authorities, rather than private interests.³³ Article 21 of the Hague Convention even permits executive interference with a placement *after* the transfer of the child from his or her country of origin, and, as a last resort, for these public authorities to arrange for the return of the child in co-operation with the Central Authority of the country of origin.

In this light, it is apparent that a 'nude' guardianship order, which can be effected merely as an *ex parte* application, taking place without the knowledge, supervision or approval of a designated authority, cannot meet this objective and fundamental premise of the Hague Convention. While it is true

29 *Innocenti Digest* 'Inter-country adoption' (1998) 5

30 Articles 6 and 7 of the Hague Convention

31 For instance, Articles 10, 11, and 12 of the Hague Convention

32 Article 23(2) of the Hague Convention

33 Brosca S 'The Rights of the adopted child and the public family policies in Inter-country adoption' in Alen A *et al* (eds) *The UN Children's Rights Convention: theory meets practice* (2007) at 458 refers specifically to the 'neoliberal' approach towards inter-country adoption in the USA, which pertains more generally in family law as well. This approach, deduced from the website of the Department of State, regards '[i]nternational adoption as a private legal matter between a private individual or couple who wishes to adopt, and a foreign court which operates under that countries laws and regulations' (at 446). She contrasts this to the prevailing approach in Europe, where a 'common element is seen in the existence of an authority charged with vigilance over the working and the supplying of post-adoption services ... and the general tendency to set these services within the central structures of government dealing with the protection of children ...'.

that in the case at hand, a social worker's report was provided, this is neither required by the procedure for the acquisition of guardianship, nor is the intervention of any other protective agency (such as the Office of the Family Advocate) mandatory. It is hence unclear as to how the assertion can be made that the procedures followed by the De Gree family met the 'spirit' of the Hague Convention.³⁴ And, although a discussion of the full import of the recently promulgated sections of the Children's Act 38 of 2005 (including those dealing with guardianship and the role of the High Court therein) lies beyond the scope of this note, we assert that the provision of the new Act which prescribes that any application for guardianship after the commencement of the Act by non-nationals must be seen as an inter-country adoption and must then be dealt with in accordance with the provisions of chapter 16 (which governs inter-country adoption)³⁵ was surely inspired by the inherent lack of involvement of a competent public authority in guardianship applications, given the extensive role otherwise accorded the High Court in relation to guardianship in general.

The point can also be made that inter-country adoption differs quite significantly from domestic adoption, which has been until now (pending a raft of new provisions in the Children's Act 38 of 2005) to a large extent a private affair, with the extent of involvement of public authorities limited to the respective roles of the Commissioner for Child Welfare and the Registrar of Adoptions. Inter-country adoption, by contrast, adds the foreign Central Authority, the foreign accredited adoption service provider, the local Central authority and local accredited inter-country adoption service provider to the equation. Hence, it is a status changing event which falls properly within the sphere of the executive branch of government.

3.2 The foundational principles related to 'co-operation' and 'mutual recognition' in article 1(b) and (c)

Secondly, as was echoed by the Constitutional Court in the context of the Hague Convention on Parental Child Abduction, it is also true for the Hague Convention on Inter-country Adoption that it 'is intended to encourage comity between state parties to facilitate co-operation'.³⁶ This system of co-operation amongst Contracting States helps to ensure that those safeguards upholding the child's best interests are secured. Furthermore, the Hague Convention intends to ensure the recognition in Contracting States of adoptions made in accordance with the Convention, both as a matter of comity between Contracting States,³⁷ and to safeguard children's interests.³⁸ Indeed, viewed from

34 Para 48 of the judgment of Heher JA

35 S 25 of the Children's Act 38 of 2005

36 *Sonderup v Tondelli*, 2001(1) SA 1171(CC) para 31

37 An illustration of the effect of comity in this sphere is to be seen in that fact that in an inter-country adoption from South Africa to Sweden, once the adoption is effected in the South African children's court, the child immediately acquires Swedish citizenship (due to the prior involvement of the Swedish Central Authority and their immediate recognition of the legal effects of the South African order of adoption) and the child therefore departs the country on a Swedish passport (Personal Communication, Swedish inter-country adoption service agency, 8 August 2007).

38 Article 1 of the Hague Convention. The aspect of safeguards is dealt with further below.

the angle of the Hague Convention, safeguarding the right of the child is incomplete without 'co-operation' and 'recognition'.

The 'co-operation' principle of the Hague Convention is further articulated in a number of substantive Convention provisions, the details of which cannot fully be explored here. Mention can be made, however, of article 7, dealing with the requirement that central authorities 'shall co-operate with each other and promote co-operation amongst the competent authorities in their states to protect children *and to achieve the other objects of the Convention* (emphasis inserted), of the provisions related to working agreements between Contracting States with a view to improving the application of the Convention in their mutual relations;³⁹ and article 25, permitting other Contracting States to declare that they will not be bound under this Convention to recognise adoption made in accordance with working agreements effected between other states.

As regards the policy objective underlying the 'mutual recognition' principle of the Hague Convention, it is obvious that since adoption necessarily entails a change of legal status, that such events must occur in such a way as to permit ratifying states to agree upfront about the form and content of the legal consequences of an adoption that has taken place in the sending country, in the subsequent country of destination. In particular, it must be recorded that the South African version of adoption which severs the child's legal relationship with his or her forebears, and which creates a new one with prospective adopters,⁴⁰ is not universally applicable as a legal construct, nor is it similarly understood and applied throughout the world. For example, there are countries, mainly Muslim countries, where the practice of adoption is usually not permitted (but *Kafalah*⁴¹ is) and hence an inter-country placement in this context might necessitate the sending country ensuring that proper (alternative) recognition of the child's legal status is undertaken. Such recognition is best not dealt with on an *ad hoc* basis by courts, but rather determined definitively in advance. Needless to say, a court faced with considering a guardianship order as a prelude to an inter-country transfer of a child has no duty to enquire into the nature and status of any adoption, or adoption-like order, in the country of destination.

The protective aspects to the child of the 'mutual recognition' requirement are mentioned briefly below, but it is important to recognise that this is as much a question of comity and public policy as well. This dimension is indicated by the requirement that children being adopted internationally have the right to equal standards and safeguards as are enjoyed in the national adoption system.⁴² The notion of equivalence of standards is further elaborated in the Hague Convention in relation to many facets of the adoption

39 Article 39(2) of the Hague Convention

40 See s 20 of the Child Care Act 74 of 1983.

41 *Kafalah* under Islamic Law entails the acceptance of children without families in what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with which they are placed. See Hodgkin R & Newell P *Implementation handbook for the Convention on the Rights of the Child* (2002) 295–296.

42 Article 21(c) of the CRC

process, including the safeguards provided for domestically to ensure that any parental consents are freely given, that equivalent time periods for the withdrawal of consent as are operative in national adoption practice are enforced, and that official records of the change of status of the child are maintained as is the case for in-country adoption (in South Africa, the records are kept centrally by the Registrar of Adoptions in accordance with section 17 of the Child Care Act 74 of 1983), and so forth. 'Mutual recognition', therefore, holds within it the idea that public authorities have the right to examine and pass judgment upon each other's domestic standards and practices before concluding that an inter-country adoption process has satisfied the demands of international law.

Clearly 'mutual co-operation' contemplates the prospect that Central Authorities might have preferred working relationships, the source of which might be dictated by any number of reasons (language, culture, proximity, prior good relationships between government agencies or adoption service providers, and so forth). That this is envisaged is evident in the existing practice of working agreements between countries or accredited adoption agencies in both sending and receiving countries.⁴³ Indeed, the judgment in *De Gree* records that South Africa has, post ratification of the Hague Convention in 2003, entered into some such agreements, including with neighbouring Botswana, a non-convention country, and begun using these working agreements as the practice mechanism for facilitating international adoption. However, the obverse side of this is that a state party can decide *not* to co-operate with a particular country, or, on the basis of its own *boni mores*, not to consider as specific prospective adoptive parents at fitting applicants even though they may be recognised as suitable in the receiving contracting state (for instance, same sex applicants). Article 24 of the Hague Convention, too, permits a contracting party to refuse to recognise an adoption 'manifestly contrary to its public policy'.

Unfortunately, the *De Gree* case in general seems to accord at best little or no attention to the 'co-operation' and 'mutual recognition'⁴⁴ objectives of the Convention. Thus the minority judgments lament the fact that no structures had been put in place to facilitate an inter-country adoption to the USA, as if this was in some way negligent or remiss. Indeed, Heher JA comes close to suggesting that the applicants were discriminated against by a Departmental policy, which was restrictive and 'not one which was likely to support or assist a United States citizen',⁴⁵ and that this was the reason for the necessity of pursuing a guardianship application rather than an adoption in the children's court. Rather, if proper regard is had to the practice under the Hague Convention, an authority is at liberty to choose with whom to pursue working rela-

43 See article 39 (2) and also Article 21 (d) of the CRC, which refers to bilateral and multilateral arrangements or agreements.

44 For instance, reference is made to this under para 87 of the judgment. The minority judgment does not refer to it at all.

45 Para 59 of judgment. He continues to say that 'they make it clear that the Department and the agency do not regard themselves as properly equipped to handle such applications by reason of the lack of contact between the social welfare agencies of the respective countries'.

tionships, based on national interest or any other factor. Equally, an authority is free to opt *not* to extend or foster working arrangements with other states.

3.3 Respect for other fundamental rights

Article 1(a) of the Hague Convention places emphasis on the need to respect the child's 'fundamental rights as recognised in international law'. This is in recognition of the fact that inter-country adoption does have a cross-cutting nature, impacting on various rights of the child. In particular, several Articles of the CRC and the ACRWC can be read in such a way as to bear upon the issue of inter-country adoption. However, time and space dictate here that only some of these rights are briefly discussed.

For instance, Article 8(1) of the CRC states, 'State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'. Therefore, the right of a child to a nationality and the prohibition against statelessness, by interpretation of article 1(a) of the Hague Convention, should not be subject to unlawful interference by inter-country adoption procedures. This right is not only entrenched in the CRC under article 7, but also under article 24(3) of the International Covenant on Civil and Political Rights (CCPR).⁴⁶ What is envisaged is the need to avoid, that in 'the context of considerable migration and the lack of harmonisation of domestic nationality laws, it happens that a child does not have the nationality of the state where he or she is born and/or resides.'⁴⁷

A combined reading of article 3 and article 7 of the CRC mandates that states need to undertake all necessary measures to allow all adoptive children to obtain, as far as possible, information on the identity of their parents,⁴⁸ an additional right of the child at international law.

Article 9(1) of the CRC can also be applied to inter-country adoption. This provision requires states to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.⁴⁹ This means that children should not be separated from their parents, including through inter-country adoption, unless it is necessary for their best interests. Besides, if the separation must inevitably take place, it should, as far as possible, take into account the consent of his or her parents and be fair.⁵⁰

In addition, article 21 of the CRC, by declaring 'that the best interests of the child shall be the paramount consideration' with regard to adoption systems, appears to lay down a clear base from which all adoption policy should

46 Article 24(3) of CCPR provides that 'every child has a right to acquire a nationality'.

47 Ziemele I 'Article 7: The right to birth registration, name and nationality, and the right to know and be cared for by parents', in Alen *et al.* (eds) *A commentary on the United Nations Convention on the rights of the child* (2007) 13

48 See for instance, CRC Committee, Concluding Observations: Kazakhstan (UN Doc. CRC/C/15/Add.213), 2003, paras 45–46.

49 Emphasis inserted. Article 19 of the ACRWC incorporates a similar provision

50 Hodgkin & Newell (fn 41 above) 131

flow.⁵¹ The use of the word 'shall' is quite forceful in this article. The mandates of article 21 are not a matter of discretion for State Parties. Article 21 clearly delineates the CRC's position with regard to inter-country adoption, on which the Hague Convention tries to build a more detailed structure. The best interests of the individual child must be conceptualised against the totality of rights accorded the child at international law. Suffice to say that in the procedure it sets up for inter-country adoption, the Hague Convention makes it its object to uphold the rights mentioned above and other rights of the child as recognised in international law (some of which are explored in the next subsection).

We argue that a guardianship application takes very little account of the overall rights of a child under international law, being premised as it is on an internal jurisdictional issue geared only to matters incidental to the exercise of one aspect (albeit an important one) of parental responsibility.

3.4 The principle of 'establishing safeguards' to ensure the best interests of the child in the Hague Convention

As already alluded to above, the Hague Convention is envisaged to serve as an effective tool to prevent abuse of, and fraud in, adoption processes. Apart from some of the issues briefly discussed above, it also engages with concrete adoption-related matters designed to protect children's rights in a variety of ways, such as the need for proper counselling for both biological parents, adoptive parents and institutions whose consent is necessary;⁵² prevention of improper financial gains and of child trafficking, and the need to keep a record of the background of the child.⁵³

The Hague Convention's most beneficial contributions to the protection of the adoption triangle in practice can be seen in the procedural requirements (including matching), the recognition of certified adoptions by operation of law, the additional safeguards concerning contact between the adoptive and biological parents prior to consent and the treatment of information on the child's origin.⁵⁴

The most horrific occurrence arising out of inter-country adoption today is the transnational trading of infants for adoption. A number of baby-trafficking incidents in the context of inter-country adoption have been documented worldwide⁵⁵ (and South Africa is not immune from this possibility), which demonstrate the complexity and pervasiveness of the problem. In addition to extorting exorbitant amounts of money from the adoptive parents, agents

51 Graff NB 'Inter-country adoption and the Convention on the rights of the child: Can the free market in children be controlled?' (2000) 27 *Syracuse Journal of International Law and Commerce* 416

52 Article 4(c) of the Hague Convention

53 See, for instance, articles 31 and 32 of the Hague Convention.

54 See, for instance, articles 14, 15 and 19 of the Hague Convention.

55 See, for instance, Wittner KM 'Curbing child-trafficking in inter-country adoptions: Will international treaties and adoption moratoriums accomplish the job in Cambodia?' (2003) 2 *Pacific Rim Law and Policy Journal* 595.

employ deceitful measures to wrest children from their birth mothers.⁵⁶ Thus, the trafficking and 'black market' selling of children concern is not only about the victimisation of children, but also about unsavoury or irregular practices with respect to birth parents, and adoptive families.⁵⁷

In order to prevent and regulate abuses and unethical practices in inter-country adoption, the Hague Convention provides various safeguards. For instance, the Convention promotes the 'no initial contact' principle in inter-country adoption. Where guided visits for prospective adoptive parents by local brokers to birth parents at home were not uncommon in order to obtain the latter's consent in exchange for money, article 29 contains one of the most important safeguards with respect to the requirement of free consent.⁵⁸ This provision generally prohibits any contact between the prospective adoptive parents and the biological parents or any other person caring for the child before the adoptability of the child and the eligibility and suitability of the parents are determined.⁵⁹ Contact is allowed for in two cases only: Adoptions which take place within a family; and contact that is in compliance with the conditions established by the state of origin.⁶⁰

The Hague Convention, by setting clearly the procedures for inter-country adoption with the involvement of the respective public authorities, minimises the risks involved in independent adoptions. For instance, independent adoptions,⁶¹ because they often occur with a very limited information base about a particular child's family health history, emotional and physical background, could turn out to be disadvantageous in the long run if this information becomes important for the child's well-being, leading to what are termed 'disrupted adoptions'.⁶² Independent adoptions also have the potential of making adopting parents susceptible to risks involved in 'adoptions for profit'.⁶³

Another area where the Hague Convention is explicit in addressing the ethics involved in adoptions relates to its requirement, *inter alia*, that payment is only allowed for costs and expenses thereby prohibiting improper finan-

56 Bisignaro SM 'Inter-country adoption today and the implications of the 1993 Hague Convention on tomorrow' (1994) 13 *Dickinson Journal of International Law* 127

57 See generally, for instance, Szejner CE 'Inter-country adoptions: Are the biological parents' rights protected?' (2006) 5 *Washington University Global Studies Law Review* 211; Blair DM 'Safeguarding the interests of children in inter-country adoption: Assessing the gatekeepers' (2005) 34 *Capital University Law Review* 349; Smolin DM 'Child laundering: How the inter-country adoption system legitimises and incentivizes the practices of buying, trafficking, kidnapping, and stealing children' (2006) 52 *Wayne Law Review* 113.

58 Van Loon H 'Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption' (1995) 3 *The International Journal of Children's Rights* 468

59 Rather, a prospective adoptive parent must first contact Central Authority in her home (or receiving) State. She must comply with all the domestic laws relating to adoption in her home State and then stand before her own Central Authority, or another accredited body, and show to their satisfaction that she is eligible and suited to adopt.

60 Article 29(a) of the Hague Convention

61 Completed without the help or aegis of a licensed social service agency, as opposed to those adoptions co-ordinated with the help of accredited adoption agencies.

62 Brosca (fn 33 above) 450 refers to summaries of recent studies indicating that in the USA, the medium average percentage of disrupted inter-country adoptions or dissolved international adoptions is 10 per cent, in the Netherlands it is also 10%, in Great Britain 18.7 per cent and the recent European average is 5 per cent.

63 Meezan W *et al*, 'Adoptions without agencies: A study of independent adoptions' (1978) 7

cial gain (including remuneration to authorities).⁶⁴ Article 4, sub-paragraph (c)(3), and (d)(4), when read with article 32, forbids any financial gain that is not reasonable. It is argued further that 'article 32 adopts a *reasonableness standard* for costs and expenses, which include any professional services rendered by the directors, administrators, and employees of any body involved in the inter-country adoption' (emphasis inserted).⁶⁵ The possibility that a Central Authority can have a 'regulatory remedy which could require audit of adoption service providers that explicitly accounts for the legality of placements, the internal matching criteria, and the disbursement of all fees collected and donations accepted'⁶⁶ facilitates further safeguards.

Although the Hague Convention does not place too much emphasis on the concept of culture of the child, it creates some room for its consideration. Article 16 of the Convention sets forth the criteria for determining whether a child is 'adoptable'. It states that 'due consideration' should be given to the child's 'ethnic, religious and cultural background'.⁶⁷ This seems to suggest that, as much as possible, the Hague Convention tries to protect and safeguard the cultural background of the child.

Articles 30 and 31 of the Hague Convention address another important issue concerning preservation of, access to and treatment of *information* relating to the child's origin – including both identity of the biological parents and medical history. Indeed, there is a growing consensus in the importance of knowing one's biological roots and the origins of adoptees.⁶⁸ As a result, the Convention makes it obligatory upon State Parties in all cases to preserve such information, independently of whether access to it is permitted by law of that state.⁶⁹ In addition, in a clear reflection of the best interests of the child principle, article 35 requires that the 'competent authorities of the Contracting States shall act expeditiously in the process of adoption'.

The transition from mono-ethical and regionally restricted adoptions to transnational and transcultural procedures not only involves psychological, social and political problems, but above all legal problems resulting from the encounter between highly divergent and potentially conflicting legal orders. Hence, the requirement of co-ordination of inter-country adoption procedures furthers the aim of controlling and preventing abuses that may violate the best interests of the child principle in relation to specific children and particular clashes between discordant legal systems.

⁶⁴ Article 32 of the Hague Convention

⁶⁵ Katz LM 'A modest proposal? The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption' (1994) 9 *Emory International Law Review* 318

⁶⁶ Eschelbach Hansen M & Pollack D 'The regulation of inter-country adoption' (2006) 45 *Brandeis Law Journal* 109

⁶⁷ Article 16 (1) (b) of the Hague Convention

⁶⁸ Brosca (fn 33 above) 460 noting that the right to an identity is a first generation right, says further that in inter-country adoption 'it is a very important right because it has not only a genetic component, but also a social component, that is, to be able to construct one's identity it is essential to know where one comes from, who were one's parents and how one was abandoned' (at 460). She notes that one of the three 'legs' of the 'travel to the past' practice is the legal possibility of knowing the identity and social origin data related to one's background.

⁶⁹ Needless to say, such data should be treated with confidentiality.

In this sense, the Hague Convention framework constitutes a model of co-operation – combining shared responsibilities of sending and receiving state and automatic recognition – and can be qualified as an appropriate system for implementing and safeguarding children's rights in inter-country adoption. The creation of an international co-operation mechanism also opens up an entirely new field of control (as opposed to criminal procedures, anti-trafficking legislation and the like). As the Hague Convention continues to build co-operation between the most important supplying and demanding states in the inter-country adoption sphere, so, too, are practical safeguards for the protection of children being improved – in their best interests.

This co-operation structure further helps to facilitate post-adoption services that may be required for the child.⁷⁰ This follow-up after adoption is in line with the recognition that 'adoption is not an event but rather a process'. Thus, under articles 8 and 9 of the Hague Convention, the Central Authority must not only prevent improper financial gain from activities associated with international adoption and oversee adoption counselling, it should also address issues of post-adoption services.⁷¹ It is argued, for instance, that these post-adoption services might include the Central Authority requesting periodic reports on the status of the adoptive family.⁷²

We contend that an application for an order conferring guardianship upon prospective adoptive parents is ill-suited to achieve all of the objectives that the Hague Convention puts in place to ensure the necessary safeguards. No information pertinent to the costs of independent lawyers or other professional generally emerges, for instance, and the *De Gree* case unfortunately illustrates only too starkly the importance for children in an inter-country adoption process of the 'no contact' rule.⁷³ The Hague system is premised on specialised services, regulated and sanctioned by public authorities, which an applicant for guardianship can merrily circumvent. Finally, we suggest that permitting backdoor inter-country adoptions via the High Court also does not serve the overall national interest in combating fraud and irregular practice in the transfer of children abroad.⁷⁴

That the guardianship route opens the door to an unsatisfactory mode of transfer of children internationally is even recognised by the host country of the applicants in this case. In this regard, the US Department of State (which

70 See, further, Brosca (fn 33 above).

71 A Central Authority should also exchange evaluation reports, and respond 'to justified requests from other Central Authorities' with regard to any shared adoption situations. The accredited bodies, to whom the Central Authority delegates limited powers, share responsibility for regulating the process of each adoption, as opposed to regulating the system. They 'facilitate, follow and expedite' adoption proceedings and follow through on post-adoption services and counseling. The accredited bodies present the advantage of relieving some of the pressure of having a single central authority.

72 Hillis L. 'Inter-country adoption under the Hague Convention: Still an attractive option for homosexuals seeking to adopt?' 6 *Indiana Journal of Global Legal Studies* 255

73 Since one aspect of the applicant's argument in support of their claim was that they had already built up a relationship with the child.

74 South Africa has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the UN Convention against Transnational Organised Crime (20 February 2004) and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (30 June 2003).

provides extensive information about the adoption processes in various countries and the concomitant legal requirements to bring a child adopted abroad to the United States) provides cause for concern.⁷⁵ According to the US Department of State, the route through the South African High Court guardianship order is not a favourable option for would-be prospective adopters. The Department indicates (under a section labelled 'Caution') that:

There have been a number of cases in which American Citizens have been issued 'Guardianship Orders' from the South African High Court. These orders do not constitute 'irrevocable release for adoption and immigration' as required by United States Immigration Law. As such, they cannot be used for immigration purposes, essentially eliminating the possibility of Immediate Relative-4 (IR-4) visas (immigrant visas for orphans who will emigrate and be adopted in the United States) from South Africa.⁷⁶

4. CONCLUSIONS

Our remarks are made against the backdrop of the fact that inter-country adoption needs a sound regulatory framework because of the various risks for, and implications that it has on, children's rights. The fact that inter-country adoption is a specialised field within children's rights (which by itself is a specialisation within the general human rights sphere) and even within adoption generally, it makes it an area that begs for a detailed and comprehensive response for its regulation. In its concluding observations to South Africa's Initial Report, the CRC Committee has raised concern 'at the lack of monitoring with respect to both domestic and inter-country adoptions.'⁷⁷ The Committee has added its further concern 'at the inadequate legislation, policies and institutions to regulate inter-country adoptions.'⁷⁸ The ratification and subsequent implementation of the Hague Convention via the Children's Act 38 of 2005 will significantly address the concerns raised by the CRC Committee and others.

We are of the view that the South African public authorities have, since ratification of the Hague Convention in 2003, taken considerable and measurable steps towards giving effect to the obligations incurred at international law. Not only has an interim Central Authority been set up, procedures and operations manuals for implementation of inter-country adoptions been drafted, channels of communication with foreign accredited agencies and Central Authorities established and working agreements concluded, but in addition, the legislature has finalised the Children's Act 38 of 2005, including a chapter domesticating the Hague Convention, and those parts of the

75 US Department of State 'Intercountry adoption' (June 2006) <http://travel.state.gov/family/adoption/adoption_485.html> (accessed 23 July 2007)

76 US Department of State 'Intercountry adoption: South Africa' (June 2006) <http://travel.state.gov/family/adoption/country/country_443.html> (accessed 23 July 2007). The South African Government, through a questionnaire it sent to the Hague Conference on Private International Law, has indicated a similar concern. It states that 'i) There are serious concerns about the abuse of guardianship orders issued by the High court to remove children to other countries with the intention of adopting the child in another country. New legislation will prohibit this practice, but is not in place as yet.' See <http://www.hcch.net/upload/adop2005_za.pdf> (accessed 23 July 2007).

77 CRC Committee, concluding observations: South Africa (UN Doc CRC/C/15/Add.122) (2000) para 26

78 CRC Committee (note 77 above) para 26. It also needs to be noted that the Committee 'further encourages the State party to reinforce its efforts to finalise its ratification of the Hague Convention of 1993 on the Protection of Children and Co-operation in Respect of Inter-country Adoption'.

Children's Act which do not require regulations have already been promulgated. This history is correctly reflected in appropriate detail in the judgment of Ponnann JA.⁷⁹ Were the Constitutional Court to sanction, at this advanced stage, an adoption-like procedure manifestly at odds with the executive's and the legislature's discernable intention, we suggest that this would come very close to violating the separation of powers doctrine and constitute interference in the legitimate sphere of activity of the other branches of government, as Ponnann JA notes.

As shown in the analysis above, some of the full implications underpinning the Hague Convention are not accorded proper appreciation in the case, particularly in the minority judgments. A guardianship order, it is argued here, does not come close to fulfilling a number of the principles of the Hague Convention. To mention but two, the 'co-operation' and 'recognition' dimensions that are central to the Hague Convention are not addressed when a High Court guardianship procedure, as opposed to an adoption application in the children's court, is followed. This is because, the involvement and role of 'public authorities' in the sending and receiving states in the adoption process, if existent at all, is very limited. The extensive regulatory interest in, and oversight of, the process of inter-country adoptions as a matter of concern for the executive will clearly not be catered for through a High Court procedure. The High Court process is party-centred, while a children's court adoption process is not, and may even permit of competing applications by prospective adoptive parents (although highly unlikely in a properly conceived inter-country adoption matter).

In addition, the guardianship order route would not guarantee the other safeguards that the Hague Convention proposes to promote on the basis of the best interests of the child. These safeguards include, as discussed above, the need for proper counselling for both biological parents, adoptive parents and institutions whose consent is necessary, curtailing improper financial gains, child trafficking, and the need to keep a record of the background of the child almost all of which, it is submitted, are paid insufficient or no attention by the *De Gree* case's minority judgments. In contrast, the majority judgments clearly understand the importance of the standards and safeguards, noting that these must be at least equivalent to those existing in the case of national adoption,⁸⁰ and that foreign adoptive parents should not escape the strictures of the children's court process.⁸¹

The 'best interests of the child' principle has been paid emphasis in the *De Gree* case by almost all judges. This is apposite, given the constitutional prominence of the best interests of the child standard. However, we suggest that, whilst it is the very same principle that the Hague Convention makes central to its purpose, the full implications of how the best interests standard plays out in the substantive provisions of the Hague Convention have been insufficiently elucidated. The link to inter-country co-operation, as stated, has not

79 At paras 89–93

80 See, for instance, para 15 of the judgment of Theron AJA.

81 See, for instance, the judgment of Ponnann JA at para 94.

been specifically identified, and the traversal of children's rights, such as the right to identity via the maintenance of records not mentioned. Further, the 'child-centred approach' identified as lying at the heart of the international legal framework by Ponnann JA⁸² encompasses a broad understanding of the theoretical reach of the 'best interests of the child' in inter-country adoptions.

We contend, further, that if South Africa's international obligations and the best interests of the child principle are to mean anything at all, it is imperative that an inter-country adoption of this nature should meet the safeguards set out in the Hague Convention. As Judge Ponnann rightly provides '[w]hat the appellants ultimately sought was in effect an inter-country adoption' even though '... how they hoped to achieve that was through the guise of some other application.'⁸³ Of course, it is not only the best interests of this individual child that is at stake, but also the best interests of other children in the Republic who might run the risk of having their rights violated as a result of the precedent that a case sanctioning an inter-country adoption through a guardianship order would set.

In summary, the conclusions by Heher JA that '[e]very principle of the Hague Convention which is relevant to this application (and its spirit) has been satisfied'⁸⁴ and that of Hancke AJA that 'the applicants produced evidence sufficient to satisfy the law of adoption in South Africa and the Hague Convention on Inter-country Adoption'⁸⁵ do not hold water when assessed against the fundamental principles of the Hague Convention and its practice. If their conclusions are to be considered legally sound, an inchoate inter-country adoption will have been set in motion, and, as our title suggests, that will indeed constitute (illicit) transfer by degree.

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82 Para 86 of the judgment

83 Para 81 of the judgment

84 Para 48 of the judgment

85 Para 101 of the judgment

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